SUPREME COURT U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACK, SAND LAKE and NORTH GREENBUSH, RENSSELAER COUNTY and CHATHAM, COLUMBIA COUNTY and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD and OYSTER BAY, NASSAU COUNTY, NEW YORK,

Appellants,

—v.—

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Appellee,

—and—

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH, and BARBARA BRENNAN,

Intervenor-Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

PORTER R. CHANDLER
Attorney for Intervenor-Appellees
1 Chase Manhattan Plaza
New York, N. Y. 10005

RICHARD E. NOLAN
JAMES J. MACKRELL
JEROME M. CONGRESS
Of Counsel.

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Pursuant to Rule 16 of the Rules of this Court, intervenor-appellees move to dismiss this appeal, or in the alternative to affirm the judgment below, on the ground that it presents no substantial federal question warranting plenary review by this Court.

Question Presented

The New York Legislature has enacted a statute providing for the free loan of secular textbooks approved by the public school authorities to all children who attend any school—public or private—which complies with the compulsory education law.

The sole question here presented is whether the First and Fourteenth Amendments require that the benefits of that statute be denied to those children—and only those children—who attend religiously-affiliated schools.

Statement of the Case

Chapter 320 of the New York Laws of 1965 and Chapter 795 of the Laws of 1966 (effective September 1, 1966) amend Section 701 of the New York Education Law to provide, *inter alia*, that the boards of education throughout the state shall purchase textbooks "designated for use in any public, elementary or secondary schools of the state or . . . approved by any boards of education, trustees or other school authorities" and loan them "upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law. . . . " (See Appendix A for full text of statute). The textbooks are not loaned to any school. They are made available directly to the pupils.

The amended Section 701 embodies the New York Legislature's recognition that availability to all children of high quality education in secular subjects is a matter of pressing public concern. The preamble declaring the Legislature's purposes in enacting the amendment to Section 701 states:

"Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the fields of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary responsibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." N. Y. Sess. Laws 1965, Ch. 320, § 1.

In this action plaintiffs sought a declaratory judgment that amended Section 701 of the Education Law, insofar as it provides for the loan of secular textbooks to pupils attending non-public schools operated under religious auspices, is contrary to the New York State Constitution and to the Establishment Clause of the First Amendment. Plaintiffs claim that the statute is unconstitutional *only* "in so far as it provides for the purchase of textbooks with public moneys for free loan to pupils attending religious schools" (Complaint, 33).* (See also the prayer for relief (34); the order and judgment of the trial court sustaining appellants' claim (77-78); "Questions Presented" in appel-

* Numbers in parentheses refer to the Transcript of Record.

lants' Statement as to Jurisdiction (p. 4)). They nowhere claim that the statute is unconstitutional in so far as it provides for the loan of books to pupils attending either (i) public schools or (ii) non-religiously-affiliated private schools.

The intervenor-defendants are the parents of children residing in the East Greenbush School District and attending Catholic parochial schools in the District pursuant to the compulsory education law. In the past, all of those parents (and others similarly situated) have purchased at their own expense the textbooks which their children have been using. (47) Under the new Section 701, those children will be entitled to the loan of secular textbooks as provided in that Section.

Defendant Commissioner and the intervenor-defendants both answered that the Section is constitutional. (37, 55) Defendant Commissioner also challenged plaintiff's capacity to sue under New York law. (39)

Intervenor-defendants further alleged that to forbid the loan of secular textbooks to children in lawful attendance under the compulsory education laws at private schools conducted under religious auspices, while permitting the loan of such textbooks to children attending other private schools not under religious auspices, would be an interference with free exercise of religion, a denial of the equal protection of the laws, and a denial of liberty and property without due process of law, contrary to the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. (57-59)

All parties moved for summary judgment. (40-43; 59-60) The trial court ruled that plaintiffs had standing to

sue, and ruled in favor of plaintiffs on the merits. (63-72; 51 Misc. 2d 297, 273 N.Y.S.2d 239 (1966)) The Appellate Division, Third Department, held that plaintiffs lacked standing to sue. (88-90; 27 A.D.2d 69, 276 N.Y.S.2d 234 (1966)) Although three of the justices in the Appellate Division found it unnecessary to rest their decision on the merits because of their determination that the plaintiffs lacked standing to sue, all five Appellate Division justices were unequivocal in their opinion that the statute contravened neither the New York nor the United States Constitution. (89, 96-104; 27 A.D.2d at 71, 75-80, 276 N.Y.S.2d at 237, 241-46)

The Court of Appeals reached the merits,* holding that the statute was a constitutional exercise of the New York Legislature's authority to provide for the secular education of all children within the state, and did not contravene either Article XI, Section 3 of the New York Constitution or the First Amendment to the Federal Constitution. (13-28; 20 N.Y.2d 109, 228 N.E.2d 791 (1967)). The court dealt first with constitutionality under Article XI, § 3 of the New York Constitution, which prohibits use of state money, property, or credit "directly or indirectly, in aid or maintenance" of any church-related school. The court held that, since Section 701 was designed not to aid religion either directly or indirectly but to benefit all school children by improving their secular education, "any benefit accruing to . . . [religiously-affiliated] schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly." (20; 20 N.Y.2d at

* Three members of the majority in the Court of Appeals thought plaintiffs lacked standing, but one member of the majority agreed with the dissent that plaintiffs did have standing.

116, 228 N.E.2d at 794) The Court noted the similarity of the textbook loan program to the activities of public libraries, which routinely loan books to parochial school students for use as aids in their course work, without any suggestion that the state is thereby providing unconstitutional aid to religiously-affiliated schools.

The Court observed that:

> "No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate state concern. . . .
>
> At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools." (20-21; 20 N.Y.2d at 116-17, 228 N.E.2d at 794)

For the same reasons the Court held that there was no violation of the First Amendment:

> "The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning nonreligious textbooks to all students, including those who attend a parochial school, establishes a religion or constitutes the use of public funds to aid

religious schools. (*Cf. Everson* v. *Board of Educ.*, 330 U.S. 1, 16, 18)

"As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments." (21-22; 20 N.Y.2d at 117-18, 228 N.E.2d at 794-95)

The dissenting judges, while declaring that amended Section 701 infringed the New York Constitution, gave no definitive opinion with respect to the status of Section 701 under the Federal Constitution, but merely expressed uncertainty in that regard. (24-28; 20 N.Y.2d at 120-24, 228 N.E.2d at 796-99).

The Lack of a Substantial Federal Question

A. *As to the Establishment Clause.*

This appeal presents no substantial federal question, but is rather an effort by appellants to overturn constitutional doctrines enunciated in *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and subsequently confirmed in such cases as *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963); and *Sherbert* v. *Verner*, 374 U.S. 398, 410 (1963).

The majority of the Court of Appeals properly grounded its decision with respect to the Federal Constitution on *Everson* v. *Board of Education*, 330 U.S. 1 (1947), in which

this Court held that a New Jersey statute reimbursing parents of children attending Catholic schools for bus transportation did not violate the Establishment Clause of the First Amendment. Given the legislature's secular purpose to aid all children regardless of the schools attended, incidental benefits to nonsecular schools did not offend the Constitution. The First Amendment's requirement that the state be "neutral" in its relations with groups of varying religious beliefs does not prohibit a state "from extending its general state law benefits to all its citizens without regard to their religious belief". (330 U.S. at 16):

> "... It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. ...
>
> Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. *That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.*" (330 U.S. at 17-18) (emphasis added)

Indeed, this Court pointed out that, under the Free Exercise Clause,

> "...New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." (330 U.S. at 16) (emphasis in opinion)

Just as the State may under *Everson* reimburse parents of non-public school pupils for the cost of school bus transportation, there is no barrier to a State's loaning secular textbooks to non-public school children whose parents would otherwise be required to pay for those books. In each case the State program serves a valid secular public purpose, and in neither case does one penny go to the school. The only real difference between the situation before and after enactment of Section 701 is that, while the parents previously paid for their children's books, the State now does so. Any benefit to the schools attended by the children is incidental.

In *Everson* the safety of school children was considered a valid public purpose despite incidental benefits to parochial schools; in like manner the amended Section 701 reflects the valid purpose of improving the secular education of all children. This is shown by the preamble expressing the purpose of the statute (see above, p. 3) and by the number of statutes, both federal and state, providing for educational benefits to all students including those attending church-related institutions.* A substantial propor-

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* *E.g.*, Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U.S.C. §§ 236-44 (Supp. II, 1966) (textbooks, library materials, shared programs); National Defense Education Act of

tion of all students receive their education in religiously-affiliated schools. The adequacy of their secular education would be significantly impaired if secular educational aid were provided, as plaintiffs insist, to all students *except* those in religiously-affiliated schools. (See majority opinion in Court of Appeals, 21-22; 20 N.Y.2d at 117-18, 228 N.E.2d at 794).

Appellants' effort to find a basis in recent precedents for their claim that *Everson* should be overruled is unconvincing. This Court has just dismissed, for lack of a substantial Federal question, an appeal challenging on First Amendment grounds a Pennsylvania bus transportation law similar to that in *Everson* and suggesting that *Everson* be overruled. *Rhodes* v. *School Dist. of Abington Township,* (No. 225) decided October 9, 1967. At the same time this Court denied a petition for certiorari challenging the same statute and expressly seeking the overruling of *Everson. Worrell* v. *Matters,* (No. 110) decided October 9, 1967. In addition, appellants ignore the decision of this Court in *Snyder* v. *Town of Newtown,* 365 U.S. 299 (1961) (*per curiam*) that an attack on bus transportation to church-related schools failed to present a substantial federal question.

Appellants purport to find some support for their position in *McCollum* v. *Board of Education,* 333 U.S. 203

1958, 72 Stat. 1581, 20 U.S.C. 401-592 (1964) (tuition payments); G.I. Bill of Rights (Veterans Readjustment Assistance Act of 1952), 38 U.S.C. §§ 1601-69 (1964) (tuition payments); G.I. Bill of Rights, 58 Stat. 289 (1944) (textbook payments); National School Lunch Act, 60 Stat. 230 (1946), 42 U.S.C. §§ 1751-60 (1964); New York State Scholar Incentive Program and Regents Scholarship Program, N.Y. Education Law §§ 600, 601-a (McKinney Supp. 1967).

(1948) (despite appellants' admission that the reasoning of the *Everson* dissenters failed to win majority acceptance in that case (Statement as to Jurisdiction, p. 14), in *Engel* v. *Vitale,* 370 U.S. 421 (1962), and in *Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963) (Statement as to Jurisdiction, pp. 14-15). None of these cases is in point. In each the Court held a state law invalid on the ground that establishment of religion results from performance of religious exercises inside the public schools. Unlike the state-sponsored activities held unconstitutional in these cases, the amended Section 701

> "makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends". (majority opinion in Court of Appeals, 21; 20 N.Y.2d at 117, 228 N.E.2d at 794).

In addition to *per curiam* dismissals of attempts to relitigate *Everson,* recent cases in this Court dealing with the merits have reaffirmed the principles declared in *Everson* and indicate their applicability to Section 701. In *McGowan* v. *Maryland,* 366 U.S. 420 (1961), this Court held that a state Sunday closing law originally having a religious purpose was not repugnant to the "establishment of religion" clause since its purpose had by the time of suit become secular—the encouragement of a day of leisure for the community—and since the law itself was reasonably calculated to achieve its ends. Speaking for the Court, Chief Justice Warren declared:

> ". . . the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulations." (366 U.S. at 442)

The views expressed in *McGowan* are also applicable to state acts, such as Section 701 of the New York Education Law, extending public benefits to *all* children.

In two of the cases invoked by appellants in their argument that *Everson* should be overruled, this Court actually cited *Everson* as a leading precedent in determining the propriety of state actions or programs having an impact in areas of religious affiliation. *Abington School Dist.* v. *Schempp,* 374 U.S. 203, 222 (1963); *Sherbert* v. *Verner,* 374 U.S. 398, 410 (1963). Moreover, the principles declared in these cases demonstrate the constitutionality of the amended Section 701. In *Schempp,* this Court said:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." (374 U.S. at 223)

In the case at bar there is present a plain and clear "secular legislative purpose"—namely, the improvement of education generally by making secular textbooks available to all requesting students, regardless of the schools they attend.

There is also present "a primary effect that neither advances nor inhibits religion". This is perhaps best demonstrated by assuming that the statute were rewritten as appellants insist. So rewritten, the statute would provide that secular textbooks must be loaned to pupils attending (a) public schools and (b) non-public schools in which no religious instruction is given, but that such textbooks must *not* be loaned to pupils attending any school in which religion is taught. The religious affiliation of the child (or of the school which he attends), would thus become the direct and sole test as to whether secular benefits should be granted or denied.

This would condition receipt of public benefits upon attendance at public schools or at private schools which were not religiously affiliated, in violation of the right of parochial school children and parents to the free exercise of their religion. In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court held that South Carolina had infringed appellant's right to the free exercise of religion by denying her application for unemployment compensation after her discharge for refusal to work on Saturday, the Sabbath day of her faith. Noting that it was

> "too late in the day to doubt that the liberties of religion * * * may be infringed by the denial of or placing of conditions upon a benefit or privilege", (374 U.S. at 404)

this Court declared that its holding

> "* * * but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.' *Everson* v. *Board of Education,* 330 U.S. 1, 16." (374 U.S. at 410) (emphasis in opinion)

As Mr. Justice Douglas stated in his concurring opinion in *Thorpe* v. *Housing Authority,* 386 U.S. 670, 678-79 (1967):

> "The recipient of a government benefit, be it a tax exemption (*Speiser* v. *Randall,* 357 U.S. 513), unemployment compensation (*Sherbert* v. *Verner,* 374 U.S. 398), public employment (*Slochower* v. *Board of Education,* 350 U.S. 551), a license to practice law (*Spevack* v. *Klein,* 385 U.S. 511), or a home in a public housing project, cannot be made to forfeit the benefit because he exercises a constitutional right."

Any burden imposed by a state without good cause on attendance at church-related schools is a burden on the parents' constitutional right to send their children to such schools. *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-35 (1925), cited with approval in *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965).

Despite appellants' effort to distinguish *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930) (Statement as to Jurisdiction, p. 12), *Cochran* is clearly

in point and strongly supports the result below. In *Cochran* this Court unanimously upheld the constitutionality of a Louisiana statute under which free secular textbooks were to be made available to all public and private school students. Since the Court had not yet held the Establishment Clause binding on the states under the Fourteenth Amendment, the statute was attacked as an unconstitutional application of public funds for a private purpose. The question whether the law constituted an "establishment of religion" was, however, implicit in the case, since the *Cochran* plaintiff's argument was that the private purpose being served was aid to church-related schools. This Court unanimously rejected that contention, holding that the Louisiana statute represented secular aid to children at all schools rather than the use of public money to aid church-related schools.

The continuing vitality of *Cochran* is shown by this Court's reference to *Cochran* to support its holding in *Everson* that the New Jersey bus transportation statute was not a use of public funds for a private purpose. Citing *Cochran,* this Court stated:

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." (330 U.S. at 7)

Appellants have thus presented no basis for their claim that the principles embodied in *Everson* and *Cochran* ought to be overruled.* We submit that this case raises no sub-

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* The cases cited by appellants (Statement as to Jurisdiction p. 10) to show that in three states provision of textbooks to parochial school students has been held to violate the state constitutions are inapposite. In *Dickman* v. *School Dist. No. 62C,* 232 Ore. 238, 260-61, 366 P.2d 533, 545 (1961), the court stressed

stantial question under the Establishment Clause, and that the appeal should be dismissed.

B. *As to the Free Exercise Clause.*

Nor does this appeal raise any substantial federal question under the Free Exercise Clause. Appellants say that "there is no reliable method by which secular and religious textbooks can be distinguished from each other" and that in consequence a danger exists that church groups will seek to influence the selection of books in the public schools. (Statement as to Jurisdiction, pp. 16, 17) This is pure speculation as to future events, with nothing in the record to suggest that such events are likely to happen and nothing to suggest that the New York courts and the New York State Department of Education would not be quick to correct any administrative abuses if such should ever occur. There is no question that the intent of the New York Legislature was to limit texts loaned under the statute to secular material, and the statute has now been so construed by the New York Court of Appeals.* (21; 20 N.Y. 2d at 117, 228 N.E.2d 794-95) Certainly the determination of the New York Legislature that the amended Section 701 is a workable means of providing good secular education

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that its decision was made without regard to federal law. In *Zellers* v. *Huff*, 55 N.M. 501, 236 P.2d 949 (1951), the trial and appellate courts treated provision of textbooks (including sectarian texts) as merely one aspect of a situation in which non-secular schools were being used as complete substitutes for public schools in certain parts of New Mexico, a situation not present here. Finally, the court in *Haas* v. *Independent School Dist. No. 1*, 69 S.D. 303, 310, 9 N.W.2d 707, 710 (1943) firmly refused to consider the constitutional question, having held that the statute clearly did not authorize the grant of textbooks to students at religiously-affiliated schools.

* This opinion is in accord with prior administrative interpretation. See Opinion of Counsel No. 181, ¶6 (July 8, 1966), issued by the Education Department of the State of New York.

to students at all schools should not be rejected on the basis of mere hypothesis.

If this branch of appellants' argument were valid, the basic assumptions underlying the entire public school system would be open to serious question. If no adequate identification of secular versus nonsecular material can be made and if this alleged fact will produce a struggle among religious groups for use of materials reflecting their various points of view, then, by the reasoning of appellants, the danger already exists, wholly apart from the present statute. Children in the public schools come from all faiths. On appellants' theory, there is nothing to prevent their parents—regardless of the present statute—from engaging in a power struggle over the choice of textbooks for public-school use only, with the result that the public schools will inevitably be subverted to the service of religion (or non-religion) wherever one group happens to predominate. We submit that such reasoning is compelled by appellants' analysis, and we further submit that it has no basis in experience and clearly no basis in the record.

A second branch of appellants' argument with respect to free exercise is that parents and parochial schools will become so dependent on state textbook aid that they "may well find themselves having to accept textbooks which are offensive to them . . . ." (Statement as to Jurisdiction, pp. 17-18) For at least two different reasons this argument fails to demonstrate a violation of the Free Exercise Clause.

First, the impact of Section 701 on education at church-related schools is far too speculative to support a holding that the free exercise of religion will be impaired. To the extent that parents fear that the unique nature of parochial

education may be weakened by use of secular texts, they are free either to reject such books or to supplement them with nonsecular material.

Second, coercive activity by the state, a prerequisite to violation of the Free Exercise Clause (see *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)) is no part of Section 701, which merely makes textbooks available upon request and involves no governmental compulsion whatsoever. Requests for books from pupils at church-related schools will of course reflect the need of students at these schools for participation in state and federal aid-to-education programs if they are not to suffer an inadequate education. However, this need is not the result of any program of the state government calculated to impair parochial education, and thus acceptance of textbooks under Section 701 would not be the result of that coercion by government which is necessary to violate the Free Exercise Clause.

The cases cited by appellants in support of their argument on the Free Exercise Clause in no way substantiate their position. These citations consist of a quotation from the majority opinion in *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963) (Statement as to Jurisdiction, pp. 17-18) which merely states that the Free Exercise Clause prohibits invasions of religious liberty by the civil authority, and citations to four cases in which this Court held that state-imposed inhibitions upon the practice of religion offended the Free Exercise Clause. *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits to person whose religion prohibited Saturday work); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (religious test for public office); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (licensing statute inhibiting religious solicitation); *Cant-*

well v. *Connecticut*, 310 U.S. 296 (1940) (licensing statute inhibiting religious solicitation).

In short, these cases show only that burdens on religious activity have been held to violate the Free Exercise Clause, but do not in any way suggest that the statute in the case at bar might offend that clause. Rather, as we show above, *Sherbert* v. *Verner* and *Everson* v. *Board of Education* clearly indicate that *denial* of secular textbooks to certain students merely because they attend church-related schools, while loaning such textbooks to students at all other schools whether public or private—the position for which appellants contend—would constitute a direct violation of the Free Exercise Clause.

CONCLUSION

It is respectfully submitted that this Court should dismiss this appeal or affirm the judgment below for lack of a substantial federal question.

Dated October 24, 1967

Respectfully submitted,

PORTER R. GHANDLER
Attorney for Intervenor-Appellees

RICHARD E. NOLAN
JAMES J. MACKRELL
JEROME M. CONGRESS
Of Counsel